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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13
14 MIGUEL ORTEGA, BENJAMIN ORTEGA,

15 Plaintiffs,

16 v.

17 CITY OF OAKLAND, OAKLAND POLICE
DEPARTMENT, WAYNE TUCKER, In His
18 Capacity as the Police Chief of the City of
Oakland, RAMON J. ALCANTAR, Individually
19 and in his capacity as a Police Officer for the
City of Oakland, B. ORTIZ, Individually and in
20 his capacity as a Police Officer for the City of
Oakland, DOES 1 THROUGH 200,

21 Defendants.
22

Case No. C-07-02659 (JCS)

**JOINT STATEMENT OF UNDISPUTED
MATERIAL FACTS IN SUPPORT OF
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Date: September 19, 2008
Time: 9:30 a.m.
Dept.: Courtroom A, 15th Floor
The Honorable Joseph C. Spero

23 Defendants City of Oakland, Chief Wayne Tucker, and Bernard Ortiz, submit the following
24 joint statement of undisputed facts as stipulated to by the parties in support of defendants' motion
25 for partial summary judgment pursuant to FRCP 56(b),(c).
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UNDISPUTED FACTS

SUPPORTING EVIDENCE

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| 1. On May 7, 2008, Officers Ortiz and Alcantar were assigned to OPD Unit 20A61 ("Blue Delta Team") to patrol International Blvd. and to disperse crowds after the Cinco de Mayo festival. | 1. Ortiz Depo. at 8:15-17, 11:7-22, 12:15-17, 16:3-5, Miguel Depo. at 9:3-18; Cinco de Mayo 1300 HRS lineup at page 5; Joyner Decl. |
| 2. Benjamin Ortega went to the intersection of 62 nd Avenue and International Boulevard with a group of more than 10 people to be with his cousins. | 2. Benjamin Depo. at 10:6-16, 14:17-24. |
| 3. Miguel Ortega was part of that group as were Genesis Preciado, Eduardo, Jaime, Luis and others. | 3. Benjamin Depo. at 14:25-15:1, 22:9-11; Preciado Depo. at 26:4-28:2; Miguel Depo at 20:2-5. |
| 4. The other people in the group were his cousins and friends who lived near his cousins' house. | 4. Benjamin Depo. at 15:2-8. |
| 5. When Benjamin walked to 62 nd and International, he was carrying a Mexican flag. | 5. Benjamin Depo. at 16:8-12. |
| 6. When he arrived at the intersection, his friend arrived and they went to McDonald's. | 6. Benjamin Depo. at 17:6-8, 10-12. |
| 7. After he left McDonald's he carried the flag to the house on 62 nd Avenue. | 7. Benjamin Depo. at 17:14-16, 23-24. |
| 8. He stayed at the house for 5 minutes and then went back to 62 nd Avenue and International. | 8. Benjamin Depo. at 18:7-14. |
| 9. He arrived at the intersection, and just stood there with his cousins. | 9. Benjamin Depo. at 18:15-19; 21:22-22:1. |
| 10. He was at the intersection with his cousins for more than half and hour. | 10. Benjamin Depo. at 21:16-24. |
| 11. Benjamin Ortega entered the intersection and crossed the street carrying the flag. | 11. Miguel Depo. at 20-6-13 |
| 12. Officer Ortiz decided to cite Benjamin Ortega for suddenly stepping from the curb. | 12. Ortiz Depo. at 24:20-25:1, 35:6-20. |
| 13. Benjamin Ortega was identified in the deposition room as the person carrying the flag. | 13. Ortiz Depo. at 26:8-10, 23-24. |

	<u>UNDISPUTED FACTS</u>	<u>SUPPORTING EVIDENCE</u>
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3	14. At one point, Officer Ortiz was trying	14. Ortiz Depo. at 33:4-8, 44:23-45:1.
4	to tell the individual with the flag to	
5	come to them or to stop.	
6	15. The officers reported to radio dispatch	15. Declaration of Harris, at Exhibit B,
7	that the "large group" refused to leave	CAD purge at 00:19-00:45.
8	the corner and two backup units were	
9	requested.	
10	16. Officer Ortiz was cussed at by someone	16. Ortiz Depo. at 30:10-31:3.
11	in the group and was called a coconut.	
12	"Coconut" is an ethnic reference as one	
13	being brown on the outside and white	
14	on the inside.	
15	17. Ortiz got out of the car and started	17. Ortiz Depo. at 27:14-15, 28:13-17.
16	walking toward the intersection heading	
17	toward the flag carrier.	
18	18. The crowd went down 62 nd Avenue on	18. Ortiz Depo. at 29:17-30:2, 5-9, 31:14-
19	foot and headed into the front yard of	32:2; Miguel Depo. at 27:10-15, 28:23-
20	the property located at 1387 62 nd	29:1, 32:4-8, 83:17-21; Second
21	Avenue and Miguel went inside the	Amended Complaint at ¶ 3.
22	house.	
23	19. Officer Ortiz followed the group. The	19. Ortiz Depo. at 38:8-22; Miguel Depo. at
24	crowd entered into the yard of the	33:16-22, 84:3-10.
25	yellow house.	
26	20. Officer Alcantar entered the fenced	20. Ortiz Depo. at 40:7-15, 23-24.
	yard first and Officer Ortiz entered after	
	him.	
	21. Officer Ortiz entered the yard because	21. Ortega Depo. at 40:17-22, 42:3-12.
	Officer Alcantar was dealing with	
	Benjamin Ortega with the flag inside	
	the yard.	
	22. Benjamin says he gave the flag to a	22. Benjamin Depo. at 22:12-23:3;
	friend and never crossed or walked into	Preciado Depo. at 33:23-34:5; Miguel
	the intersection. Genesis Preciado and	Depo. at 20:9.
	Miguel saw him walking with the flag	
	across the International.	
	23. Benjamin says he first made contact	23. Benjamin Depo. at 23:14-25, 25:25-
	with Officer Alcantar and Ortiz when	26:2.
	he was coming back to the house on	
	62 nd Avenue from McDonald's.	
	24. He was holding the flag at the time.	24. Benjamin Depo. at 24:1-3.
	25. Benjamin testified that from inside his	25. Benjamin Depo. at 24:7-16.
	vehicle, officer Alcantar told him to	
	"throw that flag before I shove it up	

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UNDISPUTED FACTS**SUPPORTING EVIDENCE**

your ass.”

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| <p>26. He also says he was alone during this encounter with Officer Alcantar. Preciado and Miguel testified that they were there during the encounter.</p> <p>27. When Officer Alcantar made the statement to him, Benjamin was crossing International Blvd. in a crosswalk.</p> <p>28. The officers told Benjamin while he was in the group to come to “come here” and Benjamin continued to walk with the group.</p> <p>29. From Ortiz’s perception, Alcantar was going to cite Benjamin for PC 148 (obstructing a police officer in the line of duty) and was going to detain him.</p> <p>30. Officer Ortiz observed Officer Alcantar confronting the flag carrier in the front yard, and then his (Ortiz) attention was immediately diverted to Miguel Ortega who was coming off the porch to come at Officer Alcantar.</p> <p>31. Miguel saw Officer Alcantar grab Benjamin and Miguel screamed at Officer Alcantar telling him to let Benjamin go or he “was going to get into it,” and then Miguel came down the steps off the porch.</p> <p>32. Miguel was going to “go out against Alcantar” and was stopped from getting to Alcantar and his brother by “the policeman.”</p> <p>33. Officer Ortiz immediately stepped in and detained Miguel.</p> <p>34. Officer Ortiz viewed the situation as officer safety concern and his job was to stop Miguel from interfering with Officer Alcantar arresting Benjamin.</p> <p>35. Officer Ortiz grabbed Miguel by the arm or back, spun him around and handcuffed him and took him out of the yard and put him in a patrol car.</p> | <p>26. Benjamin Depo. at 25:5-8; Preciado Depo at 40:2-4:4; Miguel Depo. at 25:23-26:4.</p> <p>27. Benjamin Depo. at 26:4-8.</p> <p>28. Ortiz Depo. at 33:4-11; Alcantar Depo. at 46:10-18.</p> <p>29. Ortiz Depo. at 43:16-19, 44:6-18, 60:17- 61:5.</p> <p>30. Ortiz Depo. at 45:23-46:5; Benjamin Depo. at 45:11-13, 46:10-17.</p> <p>31. Ortiz Depo. at 49:21-50:1, 24-51:2, 102:22-103:1, 108:13-14; Miguel Depo. at 36:13-22, 37:3-19; Benjamin Depo. at 45:11-13, 46:10-17; Eduardo Depo. at 33:19-20, 34:18-19, 35:1, 3-4, 8-11.</p> <p>32. Miguel Depo. at 41:6-11.</p> <p>33. Ortiz Depo. at 47:7-14.</p> <p>34. Ortiz Depo. at 59:15-18.</p> <p>35. Ortiz Depo. at 47:15-24, 78:24-79:4.</p> |
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1	<u>UNDISPUTED FACTS</u>	<u>SUPPORTING EVIDENCE</u>
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3	36. Miguel testified that he was thrown to the ground when he was handcuffed, but Officer Ortiz does not believe Miguel went to the ground.	36. Miguel Depo. at 41:19-20; Ortiz Depo. at 48:4.
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5	37. Miguel did not resist arrest.	37. Ortiz Depo. at 47:25-48:1, 51:17-20; Second Amended Complaint at ¶ 19; Miguel Depo. at 42:13-23.
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7	38. No citations were issued to either plaintiffs.	38. Alcantar Depo. at 71:7-8.
8	39. Miguel felt what he thought was a pistol to his head but later learned from his cousin that it was an “electric one.”	39. Miguel Depo. at 93:16-22.
9		
10	40. Eduardo witnessed a “big black tough officer” pull a gun, identifying the gun as a “Taser gun,” and electric gun, and a plastic gun, placed at the back of Miguel’s “neck.”	40. Eduardo Depo. at 36:4-39:12.
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12	41. Officer Ortiz is not a big black man. He is Mexican and Puerto Rican and believes his skin to be of very light complexion.	41. Ortiz Decl. at ¶ 3.
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14	42. Officer Ortiz was not carrying a Taser that day. He had not been trained or authorized to carry a Taser weapon prior to May 7, 2006.	42. Ortiz Decl. at ¶5.
15		
16	43. Neither Ortiz’s nor Officer Alcantar’s assignment included the issuance of a Taser.	43. Joyner Decl. at ¶ 6.
17		
18	44. Miguel does not know which officer put handcuffs on him, but identified Officer Ortiz as the officer who took him to the patrol car.	44. Miguel Depo. at 42:14-23; Ortiz Depo. at 51:21-22.
19		
20	45. While handcuffing Miguel, Officer Ortiz asked Miguel “So you think you’re a big man, huh?” and Miguel replied “Just tighten them” twice.	45. Miguel Depo. at 42:20-23.
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22	46. Other officers were showing up at this time.	46. Ortiz Depo. at 48:21-49:2.
23		
24	47. Officer Ortiz ran a “wants-and-warrants check” on Miguel Ortega and it came back clear.	47. Ortiz Depo. at 53:24-54:14.
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26	48. Officer Ortiz released Miguel from the	48. Miguel Depo. at 45:6-10, 47:19-21;

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UNDISPUTED FACTS**SUPPORTING EVIDENCE**

patrol car after approximately ten to thirty minutes.

Ortiz Depo. at 58:13-16, 24-59:3, 67-10; Second Amended Complaint at ¶4.

49. Officer Ortiz has not been disciplined for failure to file a report.

49. Ortiz Depo. at 70:11-13.

50. Miguel does not recall which officer mentioned immigration.

50. Miguel Depo. at 45:11-14.

51. Officer Alcantar speaks Spanish.

51. Alcantar Depo. at 41:1-2; Ortiz Depo. at 32:17-19.

52. Officer Alcantar is also Hispanic with a light complexion.

52. Ortiz Decl. at ¶4; Ortiz Depo. at 32:15-16.

53. Officer Ortiz has three complaints sustained against him, two of which are for not putting the ending mileage on the radio and one for handcuffing a suspect when he should not have.

53. Ortiz Depo. at 82:17-83:20.

54. The department has general order guidelines for use of physical force by officers and for crowd control.

54. Ortiz Depo. at 86:24-87:4.

55. The Oakland Police, Departmental General Order (DGO), Use of Force policy manual K-3 describes the force types, and K-4 is the report writing version of it.

55. Request for Judicial Notice, Exhibit A.

56. The OPD use of force policy in effect at the time of this incident is set forth in the OPD Use of Force Policy Handbook at Departmental General Order (DGO) K-3. At page 1.4 of that General Order it defines reasonable force by the standard set forth in *Graham v. Conner*, 490 U.S. 386.

56. RJN Exhibit A at pages 1.4-1.5, sections K. 1-11.

57. The OPD policy regarding contacts, detentions and arrests in effect since 1989 is contained in the OPD Training Bulletin – General Order A-7.

57. Request for Judicial Notice, Exhibit B.

58. General Order A-7 sets for the OPD policy regarding detentions including grounds for detentions and detention procedure and probable cause.

58. Id.

59. Miguel does not remember seeking any psychological counseling resulting from this incident even though he “sometimes” experiences anxiety or

59. Miguel Depo. at 57:10-58:1.

UNDISPUTED FACTS**SUPPORTING EVIDENCE**

stress when he sees police officers. He also had not discussed these things with anyone up to the date of his deposition.

60. After the incident up to the date of his deposition, Miguel Ortega did not tell anyone of his injuries.

60. Miguel Depo. at 55:15-19.

61. Miguel did not obtain any kind of medical treatment for the alleged injuries to his back and ribs.

61. Miguel Depo. at 55:20-23.

62. After the incident, Miguel held various jobs including removing asbestos, grinding cars, working with machinery, and cleaning offices and stores.

62. Miguel Depo. at 58:4-60:4.

63. Benjamin does not live at 1387 62nd Avenue. He lives at 1737 Viachoro in San Lorenzo.

63. Benjamin Depo. at 13:3-14.

64. Miguel acknowledged that the house on 62nd Avenue where he and Benjamin were on the day of the incident was his cousins' house.

64. Miguel Depo at 15:10-12; 28:2-8.

Dated: August 15, 2008

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